***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

74-1334

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

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BOSTON M. CHANCE,
LOUIS C. MERCADO, et al.,

Plaintiffs-Appellees,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,

Proposed Defendant-Intervenor-Appellant.

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No. 74-1334

Appeal from an Order of the
United States District Court for the
Southern District of New York

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# BRIEF FOR PLAINTIFFS-APPELLEES

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# BRIEF FOR PLAINTIFFS-APPELLEES

## Issues Presented for Review

1. Whether a decision is an appealable order under 28 U.S.C. §1291 or §1292(a) when it constitutes merely a interpretation of an order previously entered, and when it involves only a narrow side issue in the litigation which is one of a series of claims before the district court which anticipates rendering a decision finally resolving major aspects of this complex litigation in the near future?

2. Whether a district court judge's decision reaffirming the decision of the district court judge previously assigned to the case, which decision constituted merely an interpretation of the meaning of his own previously entered order, regarding an aspect of the relief granted by that order, should be disturbed by this Court on appeal in the absence of any showing of an abuse of discretion?

Statement of the Case

1. Previous Related Proceedings

This appeal involves a narrow side issue in the complex litigation which has already resulted in two appeals to this Court, which has in each instance affirmed the decision of the district court. See Chance et al. v. Board of Examiners et al., 458 F.2d 1167 (2d Cir. April 5, 1972) (Feinberg, J.); Chance et al. v. Board of Education et al., 2d Cir. Dkt. Nos. 73-2320, 73-2476, April 12, 1974 (Feinberg, J.). There are at the present time additional proceedings pending in the district court, which anticipates rendering a decision finally resolving major aspects of this litigation in the near future.

The case was initiated in September of 1970, by plaintiffs challenging the examinations used to select principals and other supervisors in the City School System on the ground that those examinations discriminated unconstitutionally against minority groups. After extensive proceedings

the district court issued on July 14, 1971, an opinion granting plaintiffs' motion for a preliminary injunction on the ground that the examinations had been shown to be discriminatory and could not be justified as job-related. 330 F. Supp. 203 (S.D.N.Y. 1971) (Mansfield, J.). That decision was upheld by this Court on April 5, 1971. 458 F. 2d 1167 (Feinberg, J.). Extensive negotiations and additional proceedings in the district court resulted in the entry on July 12, 1973, of a Final Judgment against the defendant Board of Examiners and a modified Preliminary Injunction against the defendant Board of Education containing parallel provisions. Those orders -- hereinafter referred to as the July 12 orders -- provided injunctive relief: (1) prohibiting the continued implementation of the old examination system previously found to be discriminatory; (2) ordering the institution of an interim system for filling vacant supervisory positions without regard to whether applicants possessed licenses as a result of the examination system previously found to be discriminatory; and (3) ordering the development of a permanent new selection system. Those orders are set forth at pp. 274-316a of the Appendix to the Board of Education's brief on the appeal to this Court in No. 73-2320. (That Appendix provides a convenient compilation of many of the previous proceedings in this case. For the convenience of the Court documents referred to in this brief not contained in the Appendix filed by the CSA on this appeal, will be cited to the Appendix in No. 73-2320 where

possible). The July 12 orders were upheld by this Court on April 12, 1974. 2d Cir. Dkt. Nos. 73-2320, 73-2476 (Feinberg,J.).

There are currently pending in the district court proceedings related both to the enforcement of the July 12 orders' provisions regarding implementation of the interim system for filling supervisory vacancies, and to the development of a permanent new selection system.

2. Decision Below

The decision below involves solely a question as to the district court's interpretation of the meaning of identical provisions in its July 12 orders regarding an aspect of the relief there granted.

The July 12 orders provided, inter alia, that pending the development of a permanent new system for the selection of school supervisors, persons who had not received licenses under the old examination system, but who satisfied the experience and eligibility requirements established by State law and by the Board of Education, were to be given an opportunity to compete for vacancies "without regard to whether such persons presently hold regular appointments or assignments, supervisory licenses, or have passed supervisory examinations, or any portion thereof, administered in the past." The orders contained a further provision specifically overriding any "law, regulation, by-law, or contract" which might require that priority in filling vacancies be given to

licensed personnel (Para. VIII subpara. 2, App. No. 73-2320, pp. 280a, 314a) (emphasis added). The obvious purpose of these provisions was to ensure that the discrimination resulting from the old examination system not be perpetuated through the operation of the kind of collective bargaining agreement provision at issue on this appeal, which grants priority in receiving assignments to all new vacancies to persons who have acquired seniority rights under the old examination system.

The July 12 orders were entered only after a hearing at which the parties, members of plaintiffs' class, prospective intervenors and, indeed, all persons with objections to present were provided a full opportunity to be heard. See generally transcript of hearing of June 28, 1973, App. No. 73-2320, pp. 201-263a. The Council for Supervisory Associations (hereinafter CSA) was present at that hearing and presented a variety of arguments regarding the proposal which became embodied in the July 12 orders, but raised no objection whatsoever to those aspects of it which barred implementation of CSA contract provisions granting licensed persons priority with respect to the filling of vacancies.[1/] The CSA also failed to present any formal motion to intervene at that time, but its oral request for intervention

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1/ The CSA's argument that plaintiffs are somehow responsible for its failure to object to these aspects of the July 12 orders at that time is absurd. It was clear from the face of the orders that they affected the transfer list provisions of the CSA contract. Plaintiffs certainly never made any representation that CSA contractual rights were not affected.

was accepted by the district court, carefully considered, and rejected in an opinion dated July 10, 1973. App. No. 73-2320, pp. 269-73a. No appeal from that denial was ever taken by the CSA. (Another prospective intervenor, Charles Wiener, did choose to present a formal motion for intervention at that time, and to appeal its denial. That appeal was heard by this Court together with the Board of Education's appeal from the July 12 orders, and the decision below affirmed in its opinion of April 12, 1974, Nos. 73-2320, 73-2476, which also affirmed the July 12 orders).

Several months after entry of the July 12 orders, plaintiffs learned that the Board of Education had ordered community school boards to fill supervisory vacancies in accordance with the "transfer list" provisions of the CSA contract. These provisions required that persons who had acquired seniority with licenses obtained under the old examination system be granted priority in consideration for all supervisory vacancies, and mandated with respect to intermediate supervisory positions that such persons be hired for any vacancy for which at least five persons from the transfer list had applied. This appeared to be in direct violation of those aspects of the July 12 orders guaranteeing plaintiffs' class an opportunity to compete on an equal basis for supervisory vacancies, and prohibiting implementation of any contractual provision which required that priority in filling such vacancies be given to persons licensed

under the old examination system. Accordingly, plaintiffs requested that the district court direct defendant Board of Education to stop enforcing the union transfer list provisions in violation of the terms of the July 12 orders. See letter from plaintiffs' counsel to Judge Mansfield dated November 15, 1973, App. No. 74-1334, pp. 12-14a.

Then district Judge Mansfield, who had presided over the case since its initiation in September of 1970, heard argument by the parties and the CSA on November 16, 1973, on the issue of whether the terms of the July 12 orders were intended to prohibit the operation of such contractual provisions as the transfer list. The parties and the CSA also submitted letters to Judge Mansfield setting forth their arguments on the issues involved. See, e.g., App. No. 74-1334, pp. 12a, 15a, 19a, 40a, 50a, 53a, 56a. During these proceedings the CSA participated and had the opportunity to present its views to the Court fully as much as the parties, as Judge Mansfield subsequently found. (Other non-parties interested in intervening to support plaintiffs' position, such as the Public Education Association and a group of acting supervisors barred from opportunity for appointment to vacancies by virtue of the transfer list provisions, were, by contrast, excluded from participation in the November 16 hearing). Moreover, the CSA's position was supported in these proceedings by both the Board of Education and the Board of Examiners. See, App. No. 74-1334,

pp. 15a, 53a, and letter dated November 26, 1973 from counsel to the Board of Examiners to Judge Mansfield.

On December 27, 1973, Judge Mansfield issued a memorandum opinion which he termed an "interpretation" of his own July 12 orders (pp. 1a,12a, infra). (Since that decision has for some reason not been included in the Joint Appendix filed by the CSA, it is reproduced as an appendix to this brief, pp. 1-13a , infra). The opinion notes that the purpose of paragraph III of the July 12 orders, establishing the interim system of selection and appointment,

> was to insure that, since licenses had been found to have been issued pursuant to a racially discriminatory examination system, the failure of an applicant to possess a license would not preclude his or her being appointed to fill a vacancy, provided certain other eligibility standards had been met. (p. 3-4a, infra.)

Judge Mansfield noted further that the transfer provisions of both the old and the new CSA contracts "if enforced, have the effect of discriminating in favor of licensed supervisory personnel seeking a transfer into a vacancy as against all other applicants for that vacancy." (p. 6-7a, infra.) He concluded that:

> "Viewing the pertinent language of the Orders in the light of their background and overall purposes, we are satisfied that they prohibit the Board [of Education] from entering into any contract which would have the effect of preferring licensed personnel, whether or not previously appointed to supervisory positions, over unlicensed personnel who are otherwise qualified under the

terms of the Orders for appointment to fill a vacancy. To hold otherwise would be to sanction the very discrimination against which the Orders were directed.

The purpose of the Orders was to insure that in filling vacancies persons who had acquired or might acquire licenses as a result of the discriminatory testing system would not be given preference over otherwise qualified applicants in the making of appointments. That purpose, as articulated in detail in our decision, 330 F. Supp. 203, and in that of the Court of Appeals affirming it, 458 F.2d 1187, as well as in the terms of our Orders, was known to the Board and to the CSA when they negotiated the current August 1973 CSA agreement. The transfer provisions of the CSA agreement violates that objective. Although the current CSA contract is couched in terms of seniority rather than of possession of a license (which had been the requirement prior to 1973) the effect is to prefer persons licensed under the discriminatory testing system, since they are the only applicants having the five or more years of continuous service entitling them, upon transfer, to preference in appointment to the vacant positions as intermediate supervisors."

(pp. 8-9a, infra.)

* * * * *

"For the foregoing reasons we conclude that the transfer provisions of the CSA provisions of the CSA agreement, by giving a preference to senior supervisory personnel, violate our Orders. ... To give preference to those appointed under a discriminatory testing system,...which is the effect of the CSA agreement's transfer provisions, would be to reward the very discriminatory practices which we have outlawed."

(pp. 11-12a, infra.)

The court noted finally with respect to the CSA's opportunity to participate in proceedings related to its interests that the CSA:

> "was given full opportunity to be heard and was heard with respect to the terms of the proposed [July 12] Orders before they were approved (see attached Memorandum Decision) [referring to July 19, 1973 decision, App. No. 73-2320, p. 269a]. When recently the possible conflict between the Orders and the transfer provisions of the CSA agreement first was raised, we permitted CSA's counsel to participate, to be heard at length at our November 16, 1973 informal hearing on the question before us, and to submit fairly extensive post-argument letters (Nov. 26 and 29, 1973) and enclosures which we have examined and considered.
>
> As a practical matter, therefore, CSA has thus been granted the rights of an intervenor for the limited purpose of contesting the issue raised by plaintiffs with respect to the transfer provisions of the CSA agreement."
>
> (p. 12a, infra.)

Nonetheless the court granted the CSA permission to formalize its limited intervention or to offer proof on the specific issue (p. 12a, infra.)

The CSA subsequently moved for reconsideration of this decision and for formal intervention before Judge Tyler to whom the case had by then been assigned. On January 21, 1974, Judge Tyler granted the CSA's motion for intervention but limited that intervention to the scope specified in Judge Mansfield's December 27 decision, thereby denying the CSA's request for general intervention. (App. No. 74-1334, p. 58a). The CSA failed to appeal that order. (Accordingly, while the CSA argues on this appeal for a grant of general intervention, that issue is not properly before this Court.)

The CSA submitted papers and arguments to Judge Tyler which constituted simply a rehash of those previously rejected by Judge Mansfield. See CSA Order to Show Cause to Intervene and for Reconsideration filed January 8, 1974; CSA letter to Judge Tyler dated January 28, 1974; App.No. 74-1334, p. 63a. On February 25, 1974, Judge Tyler issued an opinion concluding that the CSA transfer issue "received full consideration before Judge Mansfield," concurring in the latter's conclusion that "Implementation of the transfer provisions would perpetuate discrimination and seriously jeopardize the efficacy of previous orders of the court," and accordingly declining to rescind or alter Judge Mansfield's decision of December 27, 1973. (App. No. 74-1334, p. 65-66a).

It is this February 25 decision of Judge Tyler, reaffirming Judge Mansfield's December 27 decision, that is here on appeal.

The CSA's subsequent motion for a stay pending appeal was denied by Judge Tyler on March 12, 1974 on the following grounds:

> "1. I have extreme doubt that the order in question is appealable as a final order;
>
> 2. Similarly, assuming that this is an interlocutory order, it does not seem to be appealable under 28 U.S.C. 1292;
>
> 3. Two judges acting for the Court have each considered C.S.A.'s arguments; it seems, thus, unlikely that appeal of this narrow side issue will do any more than delay resolution of the case in chief; and

4. At present, it appears more than likely that the entire litigation may soon be concluded at the district court level; and

5. The order which C.S.A. attacks has been in effect since December 27, 1973; hence there seems to be no compelling urgency for this appeal, if such legally is permissable, to go forward."

(App. No. 74-1334, pp. 67-68a)

The Second Circuit panel which heard argument on March 18, 1974 on the Board of Education's appeal of the July 12 orders, subsequently denied the CSA's motion for a stay pending determination of its appeal. App. No. 74-1334, p. 69a.

## ARGUMENT

### Introduction

The CSA's appeal should be summarily dismissed as frivolous. As indicated by Judge Tyler and argued in Point I infra, the February 25 decision appealed from does not appear to be an appealable order. But even assuming that it were appealable, the issue involved is of the sort that would call for appellate intervention only on a showing that the district court had grossly abused its discretion. It involves solely a question as to the details of the relief provided which this Court said recently should be "almost the last to attract

appellate intervention". Vulcan Society et al., v. Civil Service Commission et al., 6 CCH Emp. Prac. Dec. ¶8974 at p. 6141 (2d Cir. 1973).

Moreover there can be no question in this case as to the propriety of the relief provided, since orders barring the continued implementation of such seniority and transfer provisions have become a standard aspect of the relief granted in employment discrimination cases during the past decade. It is by now well-accepted doctrine that facially neutral employment practices that perpetuate the effects of past discrimination are unlawful. See, e.g., Griggs v. Duke Power Co., 401 U.S. 421 (1971). This principle has been applied in numerous cases in this and other Circuits to prohibit the continued operation of seniority and transfer provisions comparable to those at issue in the instant case. These cases have recognized the principle embodied in the orders of the court below, that relief must provide persons who were disadvantaged under the discriminatory system maintained in the past an opportunity to obtain the jobs they would have been eligible for had there been no discrimination, at least with respect to new vacancies. 2/

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2/ See, e.g., U.S. v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); U.S. v. Local 189, United Paper Makers v. U.S., 416 F.2d 980 (5th Cir. 1969); U.S. v. Jacksonville Trml, 451 F.2d 418 (5th Cir. 1971), cert. den., 406 U.S. 906 (1972); U.S. v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); U.S. v. Chesapeake & Ohio Ry., 5 CCH Emp. Prac. Dec. 8090 (4th Cir. 1972); see generally Cooper & Sobol, Seniority and Testing Under Fair Employment Laws, 82 Harv. L. Rev. 1598 (1969).

The only question at issue is whether Judge Mansfield, who presided with painstaking care over all of the extensive proceedings in the case from its initiation in September of 1970 through his decision of December 27, 1973, erred in interpreting the meaning of the terms of his own July 12 orders. Moreover that December 27 decision has itself been reconsidered and confirmed by yet another experienced district court judge. Under these circumstances, the CSA's claims deserve little consideration by this Court.

The CSA raises a number of issues in its papers which are not properly before this Court. We will not deal with these here, nor make any attempt to correct the innumerable misstatements of fact related thereto contained in their papers.

However we feel we should make some response to the claims repeated throughout the CSA's papers that it has not been treated fairly by the two district judges below, and its request that this Court now grant it full intervention.

The request for full intervention cannot be considered by this Court, since the CSA has never appealed a decision below denying it intervention. The most recent decision on the CSA's request for intervention was Judge Tyler's order of January 21, 1974, which rejected the CSA's motion for general intervention, specifically limiting intervention to the question of whether the transfer list provisions were in conflict with the July 12 orders. (App. No. 74-1334, p. 58a).

That order was not appealed by the CSA, nor was any motion filed which would have tolled the running of time for the filing of an appeal. Accordingly, the issue of whether or not the district court should at that or any previous stage of the case have granted full intervention to the CSA is not before this Court. (As noted supra, the CSA had similarly failed to appeal the district court's July 10, 1973 decision denying its informal request for intervention. Another prospective intervenor, Charles Wiener, did appeal from that aspect of the July 10 decision denying his motion for intervention. That appeal was dismissed by this Court in its decision of April 12, 1974, Dkt. Nos. 73-2320, 73-2476.

Moreover, wholly apart from the fact that the CSA neglected to appeal the decisions below limiting its formal participation in the case, any notion that the CSA's interests have not been adequately represented in the proceedings below must be rejected. Both the defendant Board of Education and the defendant Board of Examiners fought vigorously for the CSA's position on the transfer issue. (See pp. 7-8 supra) And the CSA itself was allowed to participate fully on that issue both before Judge Mansfield and as a formal intervenor before Judge Tyler. In addition the CSA was allowed to participate in previous proceedings on an informal basis despite the fact that its interests were apparently adequately represented by the existing parties and that it failed to make

a timely motion to intervene in connection with the proceedings which resulted in the July 12 orders. Had the district court permitted all the non-parties with interests similar to or greater than the CSA's to participate formally in the proceedings below, this already exceedingly complex litigation might well have proven entirely unmanageable. Numerous different groups and individuals, ranging from the Public Education Association to teachers and supervisors, have participated in an amicus or other capacity throughout the proceedings in this case. Both the court below and this Court have been careful to permit these groups to present argument, but to prohibit them from intervening as parties in the absence of any showing that their particular interests were being affected and that they were not being adequately represented by the several parties to the lawsuit. Had this not been so, the suit would have been entirely unmanageable. The CSA was permitted limited intervention when it asserted that it had a particular institutional interest at stake. It is of course free to request such intervention in the future. It has no basis for arguing that its interests have not been adequately protected in the proceedings to date.

Moreover there is no reason to believe that the relief provided by the July 12 orders would have been any different had the CSA been formally participating as an intervenor at that time. As noted supra. p. 13 , prohibitions

against the continued operation of seniority and other systems which operate to perpetuate the effects of an unconstitutional system are standard aspects of the relief traditionally provided in equal employment cases.

## POINT I

## THE DECISION BELOW IS NOT AN APPEALABLE ORDER

Judge Tyler's February 25, 1974 decision, reaffirming Judge Mansfield's December 27, 1973 decision, is not appealable as of right either as a final decision or as an interlocutory decision under 28 U.S.C. §1292(a). Both decisions were by their own terms, as described supra pp. 8-10 , simply interpretations -- not modifications -- of the earlier July 12 orders. The July 12 orders were of course appealable, as was the July 10, 1973 order denying the CSA and Charles Wiener intervention. And both the July 10 and the July 12 orders were in fact appealed -- but not by the CSA.

It is clear that while an order modifying injunctive relief is appealable, an order merely construing or interpreting such relief is not. Thus in a case directly comparable to that at bar, the Seventh Circuit held that an order construing a preliminary injunction, but not modifying it, "is neither a final decision, so as to be appealable under 28 U.S.C.A. Sec. 1291, nor one of the interlocutory orders from which 28 U.S.C.A. Sec. 1292 permits an appeal." S.E.C. v. Investment Corp. of America,

369 F.2d 383, 384 (7th Cir. 1966). The rationale is that if the court modifies an order then it is taking substantive new action which can properly be the subject of appellate review. However, if the court is merely interpreting provisions of its own order, as here, an appellate court has little function to serve. Moreover, any other rule would permit parties to obtain review at any time merely by requesting interpretations of orders previously entered, thereby avoiding the rules regarding timely appeals. This kind of device has been clearly rejected by the courts. See, e.g. Stiller v. Squeez-a-Purse Corp., 251 F.2d 561 (6th Cir. 1958) (holding that party who failed to take a timely appeal from the first order refusing to modify injunction cannot lay new basis for appeal by simply making renewed motions for modification.)

The CSA's present appeal from the decision below is in essence an attempt to collaterally attack the July 12 orders. The CSA had an opportunity for effective review at the time those orders were entered. Its failure to pursue its appeal rights at that time cannot be remedied by an attack on the district court's subsequent interpretation of its orders.

Another decision interpreting the July 12 orders was entered by Judge Tyler on March 6, 1974, and more will very likely be entered before the conclusion of this complex case. It would be very disruptive and wasteful of the time

of this Court if each such order that may be entered were to be the subject of a separate appeal to this Court.

The February 25 decision also fails to satisfy the standards for a permissive appeal set forth in 28 U.S.C. §1292(b). The CSA never even claimed it did satisfy those standards, or requested the district court to rule that it did.

## POINT II

THE DECISION BELOW, WHICH MERELY REAFFIRMS THE DISTRICT COURT'S PREVIOUS INTERPRETATION OF THE MEANING OF ITS OWN ORDER REGARDING AN ASPECT OF THE RELIEF GRANTED BY THAT ORDER, WAS CORRECT AND SHOULD NOT BE DISTURBED BY THIS COURT ON APPEAL.

Even assuming that a district court decision which merely interprets the terms of a previous order is appealable, it should clearly be reversed only where there is an abuse of discretion. None can be found here and, indeed, there can be little doubt as to the correctness of the decision below.

As noted supra pp. 4-5 , and specifically found by Judge Mansfield in his opinion of December 27, 1972, the July 12 orders were designed, inter alia, to provide for an interim system of selection and appointment in which persons who had not received licenses under the examination system previously found to be unconstitutionally discriminatory, but satisfied certain eligibility qualifications, would have an opportunity to compete on an equal basis for vacancies, and would not be prejudiced because they lacked such licenses. The CSA contract transfer list provision here at issue is exactly the kind of provision that the language in the July 12 orders specifically outlawing any contractual provision granting priority to licensed persons was designed to cover. These issues were extensively briefed and argued before Judge Mansfield and, upon reconsideration, before Judge Tyler. See pp. 7-8, 10-11, supra.

The CSA has presented no arguments here that have not already been considered and rejected by the two district judges below.[3/] Those arguments do not merit any consideration by this Court,

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3./ Thus the CSA's argument here that Judge Mansfield erred factually in finding that the only persons who could make use of the transfer provisions were those licensed under the discriminatory selection system, was presented to and rejected by Judge Tyler, apparently on the grounds urged there by plaintiffs. The transfer provisions are not now by their terms limited to licensed persons; they are theoretically available to any person, licensed or unlicensed, who has served for five continuous years in a particular job title. However, as a practical matter no person other than a licensed person would have gotten an appointment five years ago and been permitted to remain continuously on the job. The appointment of unlicensed persons on a long term acting basis was an irregular and unusual procedure until the entry of the preliminary injunction in this case three years ago. That injunction has resulted in large numbers of appointments of unlicensed persons, but this new crop of unlicensed appointees is years away from the five year eligibility requirement for the transfer provisions. The CSA papers do not contradict this fact, and no contrary proof or argument has been introduced at any other stage of this proceeding. At most, the CSA states that some acting (i.e. unlicensed) intermediate supervisors will be able to use the transfer provision in the second year of the current collective bargaining agreement. But none can use it now, which is all that Judge Mansfield said. Moreover, even after a year or two has gone by and some persons who did not come through the discriminatory licensing system become eligible to use the transfer provisions, such persons will still be few in number. For many years to come the overwhelming bulk of persons eligible for transfer will be those who benefited from the prior discriminatory system. It is therefore clear that Judge Mansfield was factually correct in concluding that the transfer provision gave overwhelming if not exclusive preference to persons licensed under the prior discriminatory system. As such it perpetuates the effects of the past discrimination and is directly contrary to the language and purpose of the July 12 orders.

and plaintiffs will not burden the Court with repetition of the arguments submitted by them and accepted by those judges. We will instead simply rely on the arguments contained in papers we have submitted below,[4/] and on the district court opinions of December 27, 1973 (pp.1a-13a, infra) and February 27, 1974 (App. No. 74-1334 pp. 65-66a).

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4./ See, e.g., letters of Elizabeth B. DuBois dated November 15, 1973 and November 27, 1973 (App. No. 74-1334, pp. 12-14a, 40-49a; Plaintiffs' Memorandum in response to CSA Motions for Intervention and Reconsideration, filed January 18, 1974.

## CONCLUSION

For the reasons stated above, this Court should summarily dismiss the appeal from the decision below declining to rescind or alter the decision of Judge Mansfield of December 27, 1973.

Dated: New York, New York
May 1, 1974

Respectfully submitted,

Elizabeth B. DuBois

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# APPENDIX



UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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JOSTON H. CHANCE, LOUIS C. :
LACADO, et al., :
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Plaintiffs, :
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-against- : 70 Civ. 4141
: M.E.M.
THE BOARD OF EXAMINERS and :
THE BOARD OF EDUCATION OF :
THE CITY OF NEW YORK, et al., :
:
Defendants. :

- - - - - - - - - - - - - - - - - - - - -x

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SANSFIELD, Circuit Judge:

We have been asked by the parties to interpret identical provisions (1) of our Final Judgment entered on July 12, 1973, against the Board of Examiners, its members, and the Chancellor of the City School District of the City of New York pursuant to their stipulation of settlement with the plaintiffs, and (2) of a Preliminary Injunction entered on the same date against all remaining defendants (hereinafter referred to as the "Orders"). The purpose of the Orders was to establish interim procedures for the selection and appointment of supervisory personnel by Community School Boards pending the formulation of a permanent system for selection of supervisors within the New York City School System on a non-discriminatory basis that would be consistent with our decision, 320 F. Supp. 303, affirmed 458 F.2d 1157 (2d Cir. 1972).

The present application seeks to determine whether the Orders govern not only the initial appointment to supervisory positions of applicants who have never before

been appointed to fill vacancies in the school system but also the filling of vacancies by transfer and appointment of licensed personnel who hold regular positions elsewhere within the system. If the Orders govern the latter, we must decide whether they are violated by the terms of the existing collective bargaining agreement between the Board of Education (the "Board") and the Council of Supervisory Associations of the Public Schools of New York City (the "CSA").

The pertinent provisions of our Orders are Paragraphs III and VIII. The former authorizes the appointing authorities to select and appoint personnel to supervisory positions from (1) persons on lists promulgated by the Board of Examiners, those on lists which have been completed but not promulgated, or those on lists that have been prepared but not completed pending further check, (2) persons who have passed a written examination for certain positions and who have performed satisfactorily on an acting basis, and (3) persons who have been appointed on an acting basis to fill a vacancy in accordance with Special Circular 30 or similar procedures, who have completed five months' service on an acting basis, and who have satisfied the eligibility requirements set forth in Part III(A)(1) of Special Circular [illegible] For the purpose of Paragraph III of our Orders [illegible] to insure

that, since licenses had been found to have been issued pursuant to a racially discriminatory examination system, the failure of an applicant to possess a license would not preclude his or her being appointed to fill a vacancy, provided certain other eligibility standards had been met. The term "vacancy" was broadly declared to exist "when a person leaves a budgeted position permanently as in the case of transfer, resignation, retirement, terminal leave, leave in lieu of sabbaticals, promotion, termination or death." (See footnote to Par. III C, incorporating for purposes of our Orders the term "vacancy" as thus defined in Part I of Special Circular 30.)

Paragraph VIII provides that in selecting and appointing supervisory personnel pursuant to Paragraph III the appointing authority shall not be required to give priority to one of the foregoing groups of persons listed in Paragraph III as against another. In other words, each group of persons, including those licensed, those appointed on an acting basis and meeting other specified requirements, and those who might have been licensed but for the freeze imposed by our earlier preliminary decree, would be treated equally in filling vacancies during this interim period. This procedure and the philosophy it embodies is further emphasized

by the following provision found in Paragraph VIII:

> "Accordingly, pending the implementation of a new selection system pursuant to Paragraph X hereof, the appointing authority is authorized to fill vacancies either by the assignment of acting personnel, or by the appointment of licensed personnel. Nothing in this Preliminary Injunction, or in any law, regulation, by-law, or contract, shall be deemed to require that vacancies be filled by licensed personnel."

We turn next to the CSA Agreement with the Board entered into on or about October 1, 1969, to continue in effect until October 1, 1972, and which remained in force until a new collective bargaining agreement was negotiated and ratified by the CSA membership in August, 1973. The 1969-1972 collective bargaining agreement, which was negotiated and concluded prior to the controversy which gave rise to the present lawsuit, was limited to supervisory "employees serving under regular appointment in license." The pertinent provision is Article VIII, which provides that to be eligible for transfer from a school in one district and appointment to fill a vacancy in a school in another district the supervisory employee must have "completed five years or more of continuous service in license in the school from which the transfer is sought ... with each year in a special service school counting as one and one-half years." In the case of principals in elementary, intermediate and junior

high schools the school to which the transfer is sought is required to interview the nine eligible applicants with the highest seniority before considering those on existing eligible lists. In the case of intermediate supervisors the five applicants with the greatest seniority must be interviewed and, if five or more apply, the selection must be made from among these five.

In August 1973, after entry of our Orders, the CSA, which was recognized as the exclusive collective bargaining agent not only for licensed supervisors but for all others, including those serving in an acting capacity, entered into a new agreement with the Board which (although we have not been furnished with a copy) is represented as containing substantially the same transfer provisions as those described above except that since the CSA now represents unlicensed acting supervisors, seniority is described in terms of time in service rather than "in license." However, we have been advised by the parties and by the CSA that the only supervisory employees possessing five years or more of continuous service are those licensed pursuant to the examination and selection system previously found by us to have discrimination.

Thus the transfer provisions of the CSA agreements, viewed, have the effect of discriminating in favor of

licensed supervisory personnel seeking a transfer into a vacancy as against all other applicants for that vacancy. The question before us is whether that preference is permissible under the terms of our Orders. By letter dated October 11, 1973, addressed to the parties, plaintiffs' counsel contended and has since argued that the CSA agreement's transfer provisions violate our Orders and specifically the above-quoted provision of Paragraph VIII thereof. This view was initially concurred in by counsel for the Board of Examiners by letter dated October 22, 1973. (Thereafter by letter dated November 26, 1973, counsel for the Board of Examiners reversed its position to state that since transfers were dependent on seniority rather than on licensure the CSA agreement's transfer provisions did not violate our Orders.)

The Board of Education and CSA, as was to be expected, contend that the transfer provisions, being based on seniority, are consistent with our Orders. The first ground urged by the Board is that Paragraphs III and VIII of our Orders were intended to be limited to initial appointment of personnel to fill vacancies and not to govern the filling of vacancies by transfer. The language of Paragraph III supports this position to the extent that it nowhere uses the term "licensed" personnel. However,

Paragraph III A, by referring to those on lists promulgated by the Board of Examiners as eligible for appointment to fill vacancies, clearly includes licensed supervisors. Any doubt on that score is dissipated by the express repeated reference to "licensed personnel" in Paragraph VIII which prohibits a requirement "that vacancies be filled by licensed personnel."

The Board argues that "licensed personnel," as that term is used in the Orders, does not include licensed supervisors already appointed to fill vacancies, as distinguished from those who have never been appointed or who hold office on an "acting" basis. Plaintiffs disagree, contending that the very purpose of Paragraph VIII's prohibition against requiring by "contract" that vacancies be filled by licensed personnel was to override union contract provisions, which were discussed by the parties in negotiating the terms of the Orders, and that the insertion of the word "contract" was at plaintiffs' insistence.

Viewing the pertinent language of the Orders in the light of their background and overall purpose, we are satisfied that they prohibit the Board from entering into any contract which would have the effect of preferring licensed personnel, whether or not previously appointed to supervisory

positions, over unlicensed personnel who are otherwise qualified under the terms of the Orders for appointment to fill a vacancy. To hold otherwise would be to sanction the very discrimination against which the Orders are directed.

The purpose of the Orders was to insure that in filling vacancies persons who had acquired or might acquire licenses as a result of the discriminatory testing system would not be given preference over otherwise qualified applicants in the making of appointments. That purpose, as articulated in detail in our decision, 330 F. Supp. 203, and in that of the Court of Appeals affirming it, 458 F.2d 1187, as well as in the terms of our Orders, was known to the Board and to the CSA when they negotiated the current August 1973 CSA agreement. The transfer provisions of the CSA agreement violates that objective. Although the current CSA contract is couched in terms of seniority rather than of possession of a license (which had been the requirement prior to 1973) the effect is to prefer persons licensed under the discriminatory testing system, since they are the only applicants having the five or more years of continuous service entitling them, upon transfer, to preference in appointment to the vacant positions as intermediate supervisors. Each such vacancy is created upon each transfer by reason

of the transferred supervisor's leaving his or her former position, the purpose and effect of the transfer provision of the CSA agreement is to fill the most sought-after positions by licensed personnel rather than permit other qualified applicants to be considered.

The Board contends that the Orders, by reference to Special Circular 30, incorporate the transfer provisions of the CSA agreement. Special Circular 30, as promulgated by the Chancellor on October 25, 1972, sets forth detailed procedures, standards and regulations for the guidance of Community School Boards and Central Units in making assignments of "acting" supervisory personnel. A supplement to that Circular, issued on January 4, 1973, provides that "The transfer plan of the collective bargaining agreement currently in effect is applicable if the supervisory position is located in a school." When this provision was called to our attention at informal oral argument on November 15, 1973, it initially struck us as persuasive authority in support of the Board's position. However, upon closer examination of our Orders it is clear that this provision is not incorporated by reference in them. Where we sought to incorporate a provision of Special Circular 30 we did so by specific reference, such as in our footnote to paragraph XII C of our Orders. All other references to Special Circular 30 (see text of

Paragraph III C) do not incorporate it in our entire Order. Indeed the references to specific provisions would have been superfluous if such incorporation in toto had been intended. Furthermore, in dealing with assignment of acting personnel, which is the subject of Special Circular 30, we stated in Paragraph VIII of our Order:

> "With respect to the assignment of acting personnel during the aforesaid interim period, the appointing authority shall be permitted and authorized to select persons who satisfy the eligibility requirements established by state law and by the Chancellor and the Board of Education of the City of New York, without regard to whether such persons presently hold regular appointments or assignments, supervisory licenses, or have passed supervisory examinations, or any portion thereof, administered in the part." (Emphasis added)

This provision is inconsistent with the CSA agreement's transfer provisions. Another paragraph of Special Circular 30, moreover, appears to be inconsistent with those provisions. Paragraph III A(3) of Special Circular 30 provides:

> "Equal and Fair Consideration. All persons interested in filling supervisory vacancies whether application is made through transfer procedures, on an acting basis, or, in the case of elementary principal vacancies, as auxiliary principals, shall be given equal and fair consideration by the screening and interviewing committees. In essence, the same procedures shall apply to all candidates for the purpose of fairness."

For the foregoing reasons we conclude that the

transfer provisions of the CSA agreement, by giving a preference to senior supervisory personnel, violate our Orders. This interpretation should not be construed as permanently prohibiting the use of seniority as a basis for selection and appointment of applicants. Following the adoption of a permanent non-discriminatory system for the selection of supervisors in the New York City School System there will undoubtedly come a time when seniority among those selected under such a system can appropriately be recognized. To give preference to those appointed under a discriminatory testing system, however, which is the effect of the CSA agreement's transfer provisions, would be to reward the very discriminatory practices which we have outlawed.

There remains the question whether, in rendering this interpretation of our Orders, due process had been denied to the CSA because of our earlier denial of its motion to intervene. We hasten to note that its motion was made before the present issue was raised or even suggested. It was denied for the reasons set forth in our decision dated October 26, 1970, 51 P.E.R.B. 156, in response to CSA's formal motion and our Memorandum Decision dated July 10, 1973 (copy attached hereto) regarding its later informal request. Notwithstanding the denial of its motion to intervene the CSA

was given full opportunity to be heard and was heard with respect to the terms of the proposed Orders before they were approved (see attached Memorandum Decision). When initially the possible conflict between the Orders and the transfer provisions of the CSA agreement first was raised, we permitted CSA's counsel to participate, to be heard at length at our November 16, 1973 informal hearing on the question before us, and to submit fairly extensive post-argument letters (Nov. 26 and 29, 1973) and enclosures which we have examined and considered.

As a practical matter, therefore, CSA has thus been granted the rights of an intervenor for the limited purpose of contesting the issue raised by plaintiffs with respect to the transfer provisions of the CSA agreement. Should it desire to formalize its limited intervention or to offer proof on the specific issue, permission is granted. Subject to such an application being made, however, the Board is until further order of this Court barred from implementing the transfer provisions of the CSA agreement since to do so would violate our orders and to perpetuate the discrimination prohibited by them.

It is so ordered.

Albert L. Stanfield, U.S.C.J.

Dated: December 27, 1973

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BOSTON M. CHANCE,
LOUIS C. MERCADO, et al.,

Plaintiffs-Appellees,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,

Proposed Defendant-Intervenor-Appellant.

No. 74-1334

AFFIDAVIT OF SERVICE

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STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK

MELODY RUSCIANO, being duly sworn deposes and says:

1. I reside at 6015 Boulevard East, West New York, New Jersey, am over twenty-one years of age, am not a party to this action, and I am secretary to Elizabeth B. DuBois, attorney for plaintiffs-appellees in this action.

2. On this 1st day of May, 1974, I served copies of the attached Brief for Plaintiffs-Appellees on counsel for defendants and counsel for Proposed Defendant-Intervenor-Appellant, by depositing them in the United States mail, postage prepaid, addressed as indicated below:

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Melody Rusciano

Sworn to before me this
1st day of May, 1974.

Mark Charles Mark

Commission Expires March 30, 1976

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